United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

629

UNITED STATES COURT OF APPEALS
For The District Of Columbia

No. 22915

GEORGE P. NEDWARD, Appellant

v.

UNITED STATES OF AMERICA, Appellee

Appeal From The United States District Court
For The District Of Columbia

BRIEF FOR APPELLANT

Daniel R. Thompson, Esquire
Counsel for Appellant
(Appointed by this Court)
1001 Connecticut Avenue, N.W.
Washington, D. C. 20036

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TABLE OF AUTHORITIES

* Cases or authorities chiefly relied upon are marked by asterisks.

STATEMENT OF ISSUES PRESENTED

The issues are:

I. Whether appellant was denied a fair trial by his counsel's failure to subpoena vital witnesses and by the trial court's subsequent denial of a reasonable adjournment to secure the attendance of such witnesses.

II. Whether the trial court's refusal of extrinsic evidence concerning the prosecuting witness' retaliation against a defense witness for having testified "against him," which was offered to impeach his credibility, was plain error.

This case has not previously been before this court.

JURISDICTIONAL STATEMENT

Appellant, George P. Nedward, was tried and convicted, in the United States District Court for the District of Columbia, for robbery, a violation of D.C. Code §22-2901, and assault with a dangerous weapon, a violation of D.C. Code §22-502.

The District Court heard the case pursuant to its jurisdiction over offenses committed within the District of Columbia. D.C. Code §11-521. Judgment of conviction was entered January 3, 1969. This Court has jurisdiction upon appeal to review the judgment of the District Court by reason of 28 U.S.C. §1291 (1964).

REFERENCES TO RULINGS

	Pages	
	Brief	Transcript
1. Ruling against request for continuance to locate defense witness.	10-11	237-240
2. Ruling against request to call defense witness to impeach credibility of government witness.	10-11	237-240

STATEMENT OF THE CASE

A. Proceedings Below.

George P. Nedward appeals, in forma pauperis, his conviction of robbery and assault with a dangerous weapon in the United States District Court for the District of Columbia.

Appellant and his wife, Angie L. Nedward, were arrested on July 5, 1968, for the July Fourth robbery of approximately $790 belonging to Harry D. Johnson.

On September 9, they were jointly indicted for robbery, a violation of D. C. Code § 2901, and assault with a dangerous weapon, a violation of D. C. Code § 502. (R.1).*

On December 31, 1968, they were jointly tried before a jury in the District Court, the Honorable June L. Green presiding. (R.5) On defendants' pleas of not guilty the jury returned a verdict of guilty, January 3, 1969. (R.6).

On February 14, 1969, appellant was sentenced to 4 to 12 years on the robbery count and 3 to 10 years on the

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* Citations (R.) are to the record, citations (Tr.) to the transcript. The transcript was prepared by different reporters and its pagination is inconsistent. For clarity citations to transcript include the volume and page numbers as they actually appear.

assault count, the terms to run concurrently, (R.8), and Angie L. Nedward was sentenced to 10 months to 5 years, suspended with five years probation "Provided . . . she return to Arkansas to care for her children." (R.9).

Appellant is confined in the United States Penitentiary, Lorton, Virginia; he has not sought release on bond pending appeal. Mrs. Nedward has not appealed her conviction and has returned to West Helena, Arkansas. (R.14)

B. Statement of the Facts.

George P. Nedward was a dry-wall sanding sub-contractor with an average weekly income of $160 to $180. Prior to his arrest he was steadily engaged and employed as many as six assistants. (III Tr. 178-179, 206-207, 209, 231). His only large debt was about $1000, incurred when his wife was hospitalized, for which he was arranging payments. (III Tr. 180, 230). Mrs. Angie L. Nedward was a housewife.

On July 4, 1968, he and his wife were the tenants of Harry D. Johnson, resident-owner of a boarding house at 1644

Monroe St., N.W. They had been satisfactory tenants for almost one year. (I Tr. 31-32). Appellant had even done some repair work for Johnson for which he was paid with an offset against his rent. (III Tr. 224-231). Despite the length of their residence Mr. Johnson admitted he did not "get too familiar" with tenants, had had "no long conversations" with appellant and "Did not know him until that evening". (I Tr. 64-66).

On the evening of July 4, 1968, Johnson was allegedly robbed and assaulted by a partially masked man in dark clothing who forced his way into his bedroom at knife point and relieved him of his wallet. Johnson claimed he recognized his assailant as Mr. Nedward. (I Tr. 34-40). As a result of his complaint the Nedwards were arrested, indicted and tried for robbery and assault.

Their trial commenced on Tuesday, December 31, 1968, at the afternoon session. The jury was chosen from the December venire panel despite the court's realization "that this is the end of your term and we will just have to come back and get finished." (I Tr. 70-71). Due to the jury's "holdover" status the trial court was anxious to conclude the case as quickly as possible. (III Tr. 241).

The principal issues at trial were the identity of the robber and Mrs. Nedward's role in the affair.

The government's entire case on both issues was the uncorroborated testimony of the victim. Johnson testified the robbery occured as he was preparing to retire on the evening of the Fourth. His attention was attracted to Mrs. Nedward outside his door "crying and . . . saying to me open the door". Thinking her ill he complied. When he opened the door he saw Mrs. Nedward and a knife wielding man whom he took to be appellant. The man demanded his wallet and when he protested his assailant lunged through the door knocking him to the floor. As they struggled on the floor Mrs. Nedward entered the room, removed his wallet from a nightstand and handed it to the robber. Then they departed together. (I Tr. 34-40).

Johnson admitted that the scene was poorly lighted, (I Tr. 47-49); that the robber's face was partially covered by a mask, (I Tr. 65-66); and that he had not seen appellant that evening prior to the robbery. (II Tr. 18-19). He also adhered to his testimony that Mrs. Nedward was an active participant in the affair. (II Tr. 17-20).

Mrs. Nedward testified whe was watching television in her room upstairs when the front doorbell rang. She went downstairs and opened the door when "a man with dark clothes . . . pushed me in [and] put . . . a knife to my throat . . ." He forced her upstairs toward Johnson's room telling her to do as she was told. (II Tr. 54). When Johnson answered the door she was shoved into his room where she heard the robber demand money and saw the two men struggling on the floor. Then the robber told her to throw him a wallet which was lying on the bedside table "or he would hurt Mr. Johnson and then myself." When she did so the robber ran from the room alone. She tried to call the police from the telephone in Johnson's room but he prevented it. She finally called the police from a telephone in the basement apartment where she remained until they arrived. (II Tr. 55-56).

Mrs. Nedward's story was corroborated by Mrs. Florine "Peggy" Sneed who testified that the doorbell rang and she heard a female scream from upstairs shortly before 10:00 p.m. A short time later Mrs. Nedward came to her apartment crying. She used the phone to call the police,

then waited with Mrs. Sneed until they arrived, relating the story to her after she had regained her composure. (III Tr. 194-195, 201).

Appellant testified he left the Johnson house on the afternoon of the Fourth and did not return that day. After spending some time trying unsuccessfully to locate a friend he took a cab to the home of another friend, Carolyn Wade, where he remained until after midnight "just talking and drinking" with friends. He first learned of the robbery, he said, when he called the house of his aunt in search of his wife. (III Tr. 209-222).

Appellant intended to establish his alibi through the testimony of Mrs. Carolyn Wade. At the conclusion of appellant's testimony defense counsel informed the court that Mrs. Wade had not arrived and that he did not know where she was. He asked for a brief recess to locate her and was granted ten minutes since "we are going to take an afternoon recess at this time anyway." (III Tr. 236-237).

Counsel was unable to locate the witness during the recess. When the court reconvened the following colloquy occurred:

MR. NESBITT [Defense Counsel]: May we approach the Bench, Your Honor?

THE COURT: Yes.

(At the Bench)

MR. NESBITT: My apologies for being late, Your Honor. I have two problems. One is my witness. I just called her home and her mother is there and her grandmother and she advised me that the lady had to take her son to the hospital for removal of some stitches and that she did return home and I had advised her to be here at 1:30. She did return home in time for 1:30, but went to get some medicine and has not yet returned.

THE COURT: Is she under subpoena?

MR. NESBITT: I did not lay the lady under subpoena. I talked with her mother who was also there and she could not come down here today either, I mean her grandmother. I would, therefore, be required in that case to ask for a continuance. I realize I have not complied with the rule, but I would like to put my other problem out before Your Honor rules.

In the event that Your Honor does rule for a continuance on this, I am at this time advising the United States Attorney that should a continuance be granted he should interview his complaining witness.

I am advised by the witness who has just testified that when she went out into the hall during the recess, that the complaining witness approached her and had a conversation with her, the contents of which might interest the U.S. Attorney.

My understanding is that he approached this lady --

MR. SCHOENFELD [U.S. Attorney]: Which witness is it that he approached?

MR. NESBITT: The lady.

MR. SCHOENFELD: Mrs. Sneed?

MR. NESBITT: That is right. She was the last witness. And he advised her that she better get ready to move because he is putting her out because she came down and testified against him.

In the event Your Honor does not grant the continuance, I would then call this lady immediately as my only last resort.

If the Court does grant the continuance--I know this sounds--I am being honest in terms of what my--

THE COURT: This was said after she testified. It has nothing to do with the situation.

MR. NESBITT: I would call her and have her testify--

THE COURT: After her testimony that he told her this?

MR. NESBITT, Yes.

THE COURT: So what is that supposed to do?

MR. NESBITT: Prove his state of mind with regard to this case.

Well, I am telling the Court what I intend to do.

THE COURT: First of all, there will be no continuance granted since you did not have anybody under subpoena. Two, you may not recall this witness for this purpose because if this man had made any threat to her or anything of the sort prior to her testimony, that would have made all the difference

in the world. But the Court would feel that he is entirely within his rights in having this woman evicted from his house, if those are his wishes. She is a tenant there.

MR. NESBITT: Your Honor has ruled, but may I just say that I am not arguing with the basis of the Court's ruling. I am merely indicating that I would not be calling this lady for the testimony, of what her rights are, in terms of eviction. And I certainly won't be arguing with Your Honor whether he has a right to.

I would call her for the basis on which he is acting and for the basis that he stated that he was, that is, because she testified against him. But that would not be the purpose of the testimony for the jury. This case has to turn on credibility.

THE COURT: Yes.

MR. NESBITT: It is extremely germane whether or not this man should be believed on anything about what he has done in relationship to his testimony before, and I think it is a necessary fact for the jury to take into consideration.

THE COURT: The Court is having to bite her tongue on the subject of credibility. I will say at this point that I have ruled on those two things.

Does this conclude your cases? (III Tr. 237-240).

The Court then directed counsel to begin their closing arguments.

At the conclusion of its instructions to the jury the Court delivered the Allen Charge to which defense counsel objected. (III Tr. 291-292, 293).

The jury returned a verdict of guilty on both defendants on both counts. (III Tr. 299-300).

SUMMARY OF ARGUMENT

I. Appellant's right to a fair hearing included the right to present witnesses in his own behalf. The right was effectively denied him both by his defense counsel's failure to subpoena his alibi witness and the trial court's unreasonable refusal of a brief adjournment to allow that vital testimony to be placed in evidence. Defense counsel's failure to subpoena the alibi witness was entirely the result of his own neglect and constituted ineffective assistance of counsel. The court's refusal of an adjournment, on the facts of this case, was arbitrary and unreasonable and constituted an abuse of its discretion as a matter of law. The actions of court and counsel, individually or in combination, prevented appellant from presenting his sole defense and denied him a fair trial.

II. An accused may always impeach the credibility of an adverse witness and evidence of bias toward the accused is always relevant to the question of a witness's veracity. Accordingly, an accused is given broad latitude in the scope of evidence which he may introduce to show non-credibility, particularly where, as here, the resolution of the case depends on belief or disbelief of a single witness. The prosecuting witness's retaliation against a witness for the defense

demonstrated his hostility and was both relevant and material to the issue of his credibility. The trial court's rejection of this evidence of misconduct was plain error requiring reversal.

ARGUMENT

I.

APPELLANT WAS DENIED A FAIR TRIAL BY HIS COURT APPOINTED DEFENSE COUNSEL'S CONCLUSORY FAILURE TO SUBPOENA WITNESS VITAL TO HIS DEFENSE AND BY THE TRIAL COURT'S DENIAL OF A REASONABLE ADJOURNMENT TO OBTAIN ATTENDANCE OF THE WITNESS.

A. Appellant Had An Absolute Right, Which He Did Not Waive, To Present Witnesses In His Own Defense. The Right Was Denied Him By The Actions Of The Court And His Counsel.

Inherent in the concept of Due Process of Law is the right of an accused to a fair hearing. "There are certain immutable principles of justice . . . as that no man shall be condemned without . . . an opportunity to be heard in his defence." Holden v. Hardy, 169 U.S. 366, 389 (1898). "A person's right to a reasonable . . . opportunity to be heard in his defense--a right to his day in court--are basic in our system of jurisprudence." In Re Oliver, 333 U.S. 257, 273 (1948).

Recognizing the importance of a fair hearing, the Constitution grants an accused the right to the assistance of counsel in the preparation of his defense and the right to compel the attendance of witnesses to present evidence in his own behalf. U.S. Const. amend.VI. These procedural rights guaranteed by the Sixth Amendment are among the safeguards deemed necessary to insure the fundamental human rights

of life and liberty and a federal court cannot constitutionally deprive an accused of their protection. Glasser v. United States, 315 U.S. 60, 69-70 (1942). Like other constitutional safeguards, they may be waived only if that waiver is voluntarily, knowingly and intelligently make. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

At trial appellant's sole defense was alibi. The prosecuting witness, Johnson, testified that he positively identified appellant as his assailant. Appellant then took the stand in his own behalf to testify that he was elsewhere. Without further evidence the sole question for the jury on the issue of the identity of the robber was the relative credibility of the witnesses. The record shows that the Court had apparently decided the question adversely to appellant. (III. Tr. 241). The testimony of witnesses concerning his whereabouts was vital to the presentation of appellant's defense for, if believed, it would establish an absolute defense.

Alibi witnesses were unquestionably available and within the reach of the court's process. See Affidavit, Addendum. The entire record of the trial, from the voir dire examination, (I Tr. 17-18), to the presentation of the defense case, clearly shows appellant's anticipation that an alibi witness would testify in his behalf.

Yet no such witness appeared.

When appellant attempted to present his testimony he learned that his principal alibi witness, Mrs. Wade, had been delayed by the need to obtain medical treatment for her injured son and was not present in court. Appellant, through counsel, then requested a reasonable adjournment to obtain his witness's attendance but his request was denied because his defense counsel had failed to subpoena the witness.

After denial of a proffer of evidence to impeach the prosecuting witness appellant's counsel was directed to conclude his case.

The record of this case is devoid of any mention of an affirmative waiver of appellant's right to present witnesses in his own behalf. In fact, he was obviously relying heavily on the testimony of alibi witnesses to substantiate his defense. Nor does it show waiver of his right to the effective assistance of counsel which, if rendered, would have included a proper exercise of the subpoena power in appellant's behalf to insure the presence of vital witnesses. Further, despite the court's sympathy for the holdover jury, a brief adjournment would not have been an undue burden since it was obvious that the trial would continue into the next day in any event.

Appellant was denied his right to be heard as the result of his appointed counsel's ineffective assistance and the trial court's unreasonable refusal to grant him a brief adjournment.

B. Court Appointed Defense Counsel's Failure To Subpoena Witnesses Vital To The Defense Constituted Ineffective Assistance Of Counsel And Denied Appellant A Fair Trial.

The right of an accused "to have the Assistance of Counsel for his defence," U.S. Const. amend. VI, guarantees a criminal defendant much more than bare representation. The term "assistance of counsel" means effective assistance. Neufield v. United States, 73 App. D.C. 174, 182, 118 F.2d 375, 383, cert. denied, sub nom. Ruben v. United States, 315, U.S. 798 (1941). Thus, when the quality of service rendered by a trial lawyer

> " . . . is so incompetent as to deprive his client of a trial in any real sense . . . the accused must have another trial, or rather, more accurately, is still entitled to a trial."

Mitchell v. United States, 104 U.S. App. D.C. 57, 63, 259 F.2d 787, 793, cert. denied, 358 U.S. 850 (1958). Appellant's court-appointed defense counsel's failure to insure the presence of vital witnesses, through the proper exercise of the subpoena power in his behalf, denied him the opportunity to present his defense and deprived him of a fair trial.

In assessing appellant's claim of ineffective assist-

ance the court may look to the entire record. Harried v. United States, 389 F.2d 281, 285 (D.C. Cir. 1967). The entire record in this case clearly demonstrates, in light of his failure to subpoena vital witnesses upon whose testimony he hoped to build the case, that defense counsel's representation was perfunctory and rendered the presentation of evidence so inadequate that appellant was denied a fair trial within the meaning of due process of law. Cf., Borchert v. United States, 405 F.2d 735, 738 (9th Cir. 1968), cert. denied, 89 S. Ct. 1466 (1969).

The record of the case clearly shows that defense counsel's failure to subpoena the alibi witness was solely the result of his own negligent failure or omission to do so. Counsel had represented appellant both at trial and in preliminary proceedings. (R. 1). He was familiar with the case. His voir dire questioning shows his knowledge of the name of the alibi witness and his intention to introduce her testimony. (I Tr. 70-71). His remarks during the presentation of appellant's case indicate his reliance upon the testimony of an alibi witness. The record evinces his discomfiture when he learned that he would not be able to introduce her testimony.

No doubt appellant, dependant as he was upon his counsel's skill for the proper presentation of his defense, was at least equally discomfited to discover that he would

be denied the opportunity to present the witness upon whom his whole defense hinged solely because his appointed counsel did not subpoena the lady.

Appellant submits his court-appointed defense counsel's negligent failure to subpoena witnesses in his behalf constitutes ineffective assistance of counsel and deprived him of a fair trial.

C. The Trial Court's Denial of A Reasonable Adjournment Was An Abuse of Its Discretion And Denied Appellant A Fair Trial.

The granting of adjourments and other continuances is generally within the discretion of the trial court. Johnson v. United States, 291 F.2d 150 (8th Cir.), cert. denied 368 U.S. 880 (1961); Neufield v. United States, 73 U S. App. D.C. 174, 179, 118 F.2d 375, 380 (1941). Each case, however, depends upon its peculiar facts, United States v White, 324 F.2d 814 (2nd Cir. 1963), and will be reversed when the exercise of that discretion is shown to be clearly abused. Cf., J. E. Hanger, Inc. v. United States, 81 U.S. App. D.C. 408, 409, 160 f.2d 8. 9 (1947); District of Columbia v. Robinson, 208 A.2d 95, 96 (D.C. App. 1965).

A criminal court's exercise of its discretion in denying adjournments is abused when such denial is "arbitrary, fanciful or clearly unreasonable," cf., United States v. McWilliams, 82 U.S. App. D.C. 259, 261, 163 F.2d 695, 697 (1947), consid-

ered in the context of the offense charged and the evidence submitted to sustain or refute it. See, Gilmore v. United States, 106 U.S. App. D.C. 344, 349, 273 F.2d 79, 84 (1960).

Here appellant stood charged with robbery and assualt, felonies for which he could be imprisoned for as much as twenty five years. The case against him was sustained solely by the testimony of the victim who identified him as the robber. His sole defense, to which he had testified, was that he was elsewhere when the crime was committed. Unless he could introduce evidence to support his alibi the sole question for the jury was whether it believed him or Johnson. The testimony of his alibi witness was therefore crucial for it would establish a complete defense to the charges against him. The witness was not present when it became time for her testimony because (as defense counsel informed the court) she had been delayed by the need to obtain medicine for her injured son. When appellant sought a brief "continuance" to secure her presence the court denied the request, without further inquiry, since the witness had not been placed under subpoena.

Given the gravity of appellant's need, the courts refusal of a reasonable time to procure attendance of a witness who could establish a complete defense was so clearly arbitrary

and unreasonable as to constitute an abuse of discretion warranting reversal. The second Circuit Court of Appeals has so held in a case involving similar facts.

In United States v. White, 324 F.2d 814 (2nd Cir. 1963), defendant sought a two week adjournment to introduce testimony by a government "special employee" to establish a defense of entrapment to a narcotics charge. The informer was hospitalized and unable to testify but nevertheless the court denied defendant's request for an adjournment until he could be present. In reversing the conviction the court noted:

> ". . .[A]ppellant might have developed something from Lynn [the absent witness] which could have tipped the scales in his favor. . . . There was no other way for appellant to substantiate his defense. . . .
>
> "An adjournment would not have been an unduly burdensome hiatus in the trial, since the witnesses were few and the factual issues clearly defined. Moreover, appellant's counsel had not been dilatory in locating Lynn or in making it clear to the court and the prosecution that intended to rely heavily on his testimony. . . . Discretion in granting continuances rests with the trial judge. . . .However, each case depends on its peculiar facts. Under all the circumstances presented here, we hold that the trial court erred in denying appellant's motion to adjourn for a reasonable time so that Lynn's testimony could have been presented." [Citations omitted].

324 F.2d at 816.

In the instant case, the facts favoring an adjournment were even more compelling. Appellant did not need a two week adjournment, at most only a few hours would have been required. Appellant's need for the testimony was equally as great as in White but here the absent witness was not a hostile government informer who would yield information only grudgingly. In neither case was the prospective witness under subpoena. Unlike White, production of the absent witness would not have been at government expense. Finally, the absent witness in this case was within the jurisdiction of the court and ostensibly ready to testify but for the need to secure treatment for her injured child. Under those circumstances, essential fairness required that appellant be given a reasonable time to procure the witness.

In addition, an adjournment was proper to allow defense counsel to cure the defect in his representation which had essentially deprived appellant of the right to compel the attendance of witnesses. Denial of an adjournment to allow a defendant a reasonable opportunity to exercise his fundamental rights is an abuse of discretion as a matter of law. People v. Vallot, 20 N.Y. 2d 600, 604, 286 N.Y.S. 2d 1, 4, 233 N.E. 2d 103, 105 (1967) (Fuld, C. J.); see also, People v. O'Dell, 41 N.Y.S. 2d 774, 266 App. Div. 822 (1943);

People v. Neal, 290 Mich. 123, 287 N.W. 402 (1939); Bethel v. State, 123 Fla. 806, 167 S 685 (1936).

Appellant submits the trial court's unreasonable and arbitrary denial of his request for a reasonable adjournment was an abuse of its discretion and denied him a fair trial.

II

THE TRIAL COURT'S REFUSAL TO ADMIT EVIDENCE OF THE PROSECUTING WITNESS' MISCONDUCT FOR THE PURPOSE OF IMPEACHING HIS TESTIMONY WAS PLAIN ERROR REQUIRING A NEW TRIAL.

Following denial of a continuance defense counsel proffered the testimony of Florine "Peggy" Sneed in an effort to impeach the prosecuting witness by a showing of his bias and hostility toward the defendants. Mrs. Sneed, herself a tenant of Johnson's, had previously testified in Mrs. Nedward's behalf. During the afternoon recess immediately proceeding the proffer, Johnson had approached her and threatened to evict her because of her testimony.

The court rejected the proffer, holding that intimidation of a witness after her testimony was immaterial and that Johnson had the right to evict Mrs. Sneed since she was merely a tenant. Defense counsel protested, noting that the opportunity to impeach Johnson was crucial since, as the case then stood, the only real issue was the relative credibility of the witnesses. This case "has to turn on credibility," counsel noted. "[I]t is extremely germane

whether or not this man should be believed. . .and I think it is a necessary fact for the jury to take into consideration." To which the court replied:

"THE COURT: The Court is having to bite her tongue on the subject of credibility. I will say at this point that I have ruled on these two things.

Does this conclude your cases?"

(III Tr. 240).

Whereupon defense counsel informed the court that he had concluded.

The trial court's refusal of the proffered testimony was plain error prejudicing the substantial rights of the accused and requiring reversal. Fed. R. Crim. Proc. 52 (b).

"Bias of a witness," this Court has said, "is always relevant." Villaroman v. United States, 87 U.S. App. D.C. 240, 241, 184 F.2d 261, 262 (1950). A party's right to undertake demonstration of the bias of his adversary's witness coexists on the same plane with the adversary's right to use the witness. Wynn v. United States, 397 F.2d 621, 623, D.C. Cir. (1967). Such an effort may properly solicit over a wide range any information of potential

value to the trier of fact in the assessment of credibility. Blair v. United States, 401 F.2d 387 D.C. Cir. (1968). See also, Jones v. Schanck, 101 U. S. App. D.C. 336, 337, 248 F.2d 658, 659 (1957); 3 Wigmore, Evidence §§ 949, 950 (3d. ed. 1940).

Bias may be shown by cross-examination or by extrinsic evidence independent of cross-examination. Ewing v. United States, 77 U.S. App. D. C. 14, 21 135 F.2d 633, 640, cert. denied, 318 U.S. 776 (1943). The prosecuting witness' retaliation against Mrs. Sneed for having assisted the Nedwards readily suggests the possibility of residual hostility. cf. Wynn v. United States, supra, 397 F. 2d at 623-624.[3]

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[3] In addition to demonstrating bias, Johnson's alleged threat against Mrs. Sneed, if true, was a serious federal crime.18 U.S.C.§1503 provides, in pertinent part, that "whoever. . .endeavors to influence, intimidate, or impede any witness, in any court of the United States. . .or injures any party or witness in his person or property on account of his attending or having attended such court. . . shall be fined. . .or imprisoned. . .or both." The mere accusation of such grievous misconduct on the part of prosecuting witness cast a pall upon the integrity of the trial which it was the duty of the court to dispell either by a determination of its falsehood or, if deemed true, by some action sufficient to remove the taint. While the treatment accorded the accusation was within the court's discretion, appellant contends the court's cavalier disregard of pertinent information advanced in good faith amounts to a total failure to exercise any discretion at all.

While the trial judge unquestionably retains control of the scope of the testimony a judicial discretion soundly exercised contemplates that there will be ample latitude for pertinent inquiry. See 3 Wigmore, Evidence §944 (3rd. ed. 1940). See also, Jones v. Schanck, supra, 101 U.S. App. D.C. at 337, 248 F. 2d at 659; Villaroman v. United States, supra, 87 U.S. App. D.C. at 241, 184 F. 2d at 262. In cases like this the latitude allowed for impeachment is doubly critical. "[W]here, as here, the Government's case may stand or fall on the belief or disbelief of one witness, his credibility is subject to close scrutiny." Gordon v. United States 344 U.S. 414, 417 (1953).

It is immaterial that the threat of eviction aimed at Mrs. Sneed came after her testimony. Appellant's effort was to show Johnson's animosity as a motive for his accusations and testimony. Johnson's state of mind on the witness stand was a proper subject for inquiry and the misconduct appellant sought to inquire into was material to the issue of his credibility. Cf., Wynn v. United States,

supra, 397 F. 2d at 624. The trial court's exclusion of Mrs. Sneed's impeachment testimony was plain error, substantially affecting appellant's rights by depriving him of a legitimate means of countering the testimony against him and requiring reversal. F.R. Crim. P. 52 (b). Without Johnson's testimony appellant could not be connected with the alleged crime. On the other hand, while appellant emphatically denied robbing Johnson, there was no evidence, except his own testimony to support his alibi claim. With credibility so vital to resolution of the issue their opposing testimony generated, the injury to appellant from exclusion of the proffered testimony was so grave that he must be afforded a new trial.

CONCLUSION

Appellant respectfully prays, for the foregoing reasons, that his conviction be reversed and the case remanded to the District Court for a new trial.

Daniel R. Thompson, Esquire
Counsel for Appellant
(Appointed by this Court)
1001 Connecticut Ave., N.W.
Washington, D.C. 20036
659-4660

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing

Brief for Appellant was delivered on the 21st day of August, 1969, to the Office of the United States Attorney, United States Courthouse, Washington, D.C.

Daniel R. Thompson

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

GEORGE P. NEDWARD	:	
Appellant	:	
v.	:	No. 22915
UNITED STATES OF AMERICA	:	
Appellee	:	

AFFIDAVIT

District of Columbia, ss:

My name is Helen D. Reed. I am a resident of the District of Columbia where I have resided for 43 years.

On July 4, 1968, I had a crab feast at my home at 45 S Street, N.W., in the District of Columbia. The feast was attended by my granddaughter Carolyn Wade, George P. Nedward, an acquaintance of ours and by several other people.

Mr. Nedward arrived at my house at about 6:00 p.m. on the 4th. He remained at the crab feast for the entire evening and did not leave until sometime between midnight and 1:00 a.m.

Helen D. Reed
Helen D. Reed
45 S Street, N.W.
Washington, D.C.

Subscribed and sworn to before me this 4th day of August, 1969.

Margaret L. Cox
Notary Public